Supreme Court, U.S.
FILED
OCT 13 1995
CLERK

No. 95-445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,
v.
RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF FOR RESPONDENTS RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, EDWARD D. PARE, JR., AND ALLAN M. SHINE IN OPPOSITION

LEONARD DECOF
JOHN S. FOLEY
HOWARD B. KLEIN
DECOF & GRIMM
One Smith Hill
Providence, RI 02903
(401) 272-1110

H. BARTOW FARR, III *
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

21 pp

QUESTIONS PRESENTED

1. Whether a state law protecting settling defendants from suits for contribution by non-settling defendants, while providing non-settling defendants with a dollar-for-dollar offset against potential liability, has a rational basis.

2. Whether petitioner—who was given, and took advantage of, the opportunity to file briefs and present argument about the merits of a settlement with a joint tortfeasor—was deprived of procedural due process.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
DISCUSSION	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948)	15
Ernst & Young v. Depositors Economic Protection Corp., 862 F. Supp. 709 (D.R.I. 1994)	4
Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530 (1st Cir. 1995)	2, 4
General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992)	9
In re Jiffy Lube Securities Litigation, 927 F.2d 155 (4th Cir. 1991)	16
In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992)	16
Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994)	9
McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994)	11, 12, 13
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)	*passim*
Rhode Island Depositors Economic Protection Corp. v. Brown, 661 A.2d 969 (R.I. 1995)	5
Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984)	14, 15
Strickland v. Simpkins, 221 Va. 730, 273 S.E.2d 539 (1981)	15
United States v. Carlton, 114 S. Ct. 2018 (1994)	9, 12, 13, 14
United States v. Darusmont, 449 U.S. 292 (1981)	12
United States v. Hemme, 476 U.S. 558 (1986)	12
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	9, 12, 15
Vigneau v. LaSalle, 111 R.I. 183, 300 A.2d 642 (R.I. 1973)	16
Welch v. Henry, 305 U.S. 134 (1938)	12
Statutes	
42 U.S.C. § 9613(f)(2)	3, 12
Other Materials	
Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (1955)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-445

ERNST & YOUNG LLP,

Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

---

BRIEF FOR RESPONDENTS RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, EDWARD D. PARE, JR., AND ALLAN M. SHINE IN OPPOSITION

STATEMENT

This case involves a challenge by petitioner to a Rhode Island statute that, in certain cases, protects settling defendants from suits for contribution by non-settling defendants. The Supreme Court of Rhode Island upheld the statute against various claims of unconstitutionality, holding that the law was a rational means of promoting settlement. Pet. App. 1a-21a.

a. Nearly five years ago, the then-Governor of Rhode Island proclaimed a banking emergency in that State.

Concerned about possible insolvency of the Rhode Island Share and Deposit Indemnity Corporation (RISDIC),[1] Governor Sundlun ordered the closing of the financial institutions and credit unions that it had insured. Pet. App. 3a. As a result, depositors with accounts in those institutions were prevented from withdrawing their funds. Pet. App. 3a. A receiver was then appointed for RISDIC.

The Rhode Island Legislature subsequently enacted legislation creating the Depositors Economic Protection Corporation (DEPCO),[2] and charged it with the obligation to repay depositors with accounts in the closed institutions. Pet. App. 3a. In addition, the legislature gave DEPCO two other important responsibilities: liquidating the institutions' assets and obtaining recovery from those responsible for the crisis. As to the first task, DEPCO has been highly successful: it has repaid full principal to depositors, along with most interest.

The prosecution of lawsuits against potential tortfeasors proved more troublesome. Although "[a] special state commission charged with investigating the banking crisis found no shortage of miscreants," *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 532 (1st Cir. 1995),[3] the extensive litigation initiated by

---

[1] "The Rhode Island General Assembly chartered RISDIC in 1969 as a private deposit-insurance corporation. It began operations in 1971, subject only to state, not federal, regulation. Depositors tended to view RISDIC as a state-sponsored enterprise, and its proprietors—the banks and credit unions that dealt with it—did nothing to dispel this misconception." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 532 n.1 (1st Cir. 1995).

[2] Unlike RISDIC, *see* note 1 *supra*, DEPCO is a public corporation.

[3] As the Court below noted, the commission found fault with, among others, former officers and directors of the institutions, certain large borrowers, and various state officials, as well as RISDIC and its officials. Pet. App. 4a. Moreover, the Court observed, "[t]he commission also focused on the public accounting firm of Ernst & Young, which had provided accounting services to RISDIC and to

DEPCO was further complicated by the unsurprising fact that many of the defendants sought to shift blame among themselves. These corollary disputes led to two problems: first, it made suits brought by DEPCO more costly and time-consuming and, second, it made settlements with any particular defendant more difficult. This is because, as a general rule, Rhode Island law provides that a settling defendant remains potentially liable to other defendants for its proportionate share of liability. *See* Pet. App. 5a. In addition, the insurance policies covering officers, directors, and a broad range of other defendants and putative defendants were "wasting-asset policies" that deduct costs of defense—as well as settlements and judgments—from the policy limits.

To address these concerns, the Rhode Island Legislature enacted the statute at issue in this case. Patterned after the 1955 version of the Uniform Contribution Among Tortfeasors Act, as well as the settlement and contribution provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9613(f)(2), the statute provides that any defendant resolving its liability to DEPCO "in a judicially-approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement." *See* Pet. App. 5a (setting out full text of Act). The law further states that "[s]uch settlement does not discharge any other joint tortfeasors unless its terms so provide," but it expressly establishes a credit against "the potential liability of such joint tortfeasors by the amount of the settlement."

The statute thus allows a settling defendant to resolve its liability once and for all. Its effect on non-settling defendants is two-fold: on the one hand, it eliminates

---

many of its insureds, as among the parties deserving special mention." Pet. App. 4a.

the opportunity to seek contribution from a settling defendant, while, on the other, it reduces the potential liability of a non-settling defendant by the full amount of the settlement. *See* Pet. App. 5a.

b. Petitioner—a defendant in a suit brought by DEPCO and a third-party defendant in other suits brought by DEPCO—initially challenged the statute in federal court, seeking a declaratory judgment that it violated a variety of constitutional provisions. The district court held that the challenge was not ripe and that, in any event, abstention was appropriate. *See Ernst & Young v. Depositors Economic Protection Corp.*, 862 F. Supp. 709 (D.R.I. 1994). The court of appeals affirmed. *See Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d at 535-41.

The present action involves a suit brought by DEPCO against certain former officials of the Brown University Employees Credit Union (the Brown defendants), an institution insured by RISDIC. The suit alleges that defendants' negligence resulted in the failure of the institution and, ultimately, in damage to DEPCO. Defendants filed a third-party complaint for contribution and indemnity against petitioner and certain of its present and former partners. *See* Pet. App. 2a.

The constitutional challenges to the Act came before the state Supreme Court on two separate paths. First, the Governor of the State requested a written opinion from the Court with respect to three questions, including whether the provisions of the Act "violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[4] Second, the Brown defendants asked the trial court to certify largely the same

[4] The full text of the questions is set forth in the opinion of the Supreme Court of Rhode Island at Pet. App. 1a-2a.

questions to the Supreme Court.[5] Three days later, DEPCO filed a similar motion, as well as a motion seeking approval of a settlement between itself and the Brown defendants. Pet. App. 2a-3a. The settlement was expressly conditioned on the Act being held constitutional. Pet. App. 24a.

The trial court then undertook to determine whether the settlement met the standards of the Act. As part of its inquiry, it gave petitioner the opportunity to address the terms of the settlement, to which petitioner was not a party, in both written and oral submissions. Petitioner took advantage of the opportunity, filing a brief with the court and offering argument at the hearing to evaluate the settlement.[6] Ultimately, the trial court approved the settlement, finding it to be "fair and reasonable, made in good faith, and . . . in the best interests of the moving parties and the receivership estates." Pet. App. 26a. The Supreme Court, in a separate appeal, affirmed. *Rhode Island Depositors Economic Protection Corp. v. Brown*, 661 A.2d 969 (R.I. 1995).

Petitioner also continued, in somewhat roundabout fashion, its effort to have the Act declared unconstitutional. Although its principal argument was that the Supreme Court should *not* decide the constitutional issues presented to it, it argued, in the alternative, that the law violated the equal protection clause, the due process clause, the bill of attainder clause, and the contract clause. Rejecting the contention that the issues were not suitable for its decision, the Supreme Court elected to address

---

[5] The only difference was that the certified questions also requested an opinion with respect to whether the statute violated the contract clause. See Pet. App. 26a-27a.

[6] Petitioner "had also received massive discovery from representatives of Rhode Island Depositors Economic Protection Corporation (DEPCO) and the receiver of Brown Union and other credit unions incident to litigation filed by DEPCO and the receiver against Ernst & Young in 1992." *Rhode Island Depositors Economic Protection Corp. v. Brown*, 661 A.2d 969, 970 (R.I. 1995).

them "in the form of an opinion," stating that its "findings shall therefore be legally binding." Pet. App. 3a. On the merits, it rejected petitioner's constitutional arguments across-the-board.

Turning first to the equal protection arguments, the Court noted that the Act was "an example of economic legislation entitled to rational basis review." Pet. App. 7a. The Court then determined that the law readily met that standard. Looking to the state interest in promoting good-faith settlements, the Court observed in particular that the insurance policies covering defendants in this type of litigation deducted the costs of defense from the policy limits, "thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments." Pet. App. 9a. It was thus "persuaded that encouraging payment of insurance proceeds to DEPCO in the form of settlements, instead of allowing them to be dissipated through payment of costs of defense of protracted litigation, is certainly a legitimate legislative objective." Pet. App. 9a.

The Court reached a similar conclusion in rejecting arguments based on the due process clause. Recognizing the two-part rational basis test applied by this Court to retroactive legislation, *see* Pet. App. 10a-11a (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)),[7] the Court found that the Act met this standard as well as an apparently stricter standard applied under state law.[8] In so doing, the Court

---

[7] Although DEPCO took the position that the statute was prospective in nature—arguing that a claim for contribution arises only when a joint tortfeasor actually pays a disproportionate share of liability—the Supreme Court disagreed, holding that the claim arises at the time of the underlying tort. Pet. App. 12a. It thus concluded that the Act "has a retroactive effect." Pet. App. 12a.

[8] Under state law, "the purpose of a [retroactive] statute must be such that, on balance, outweighs the unfairness of retroactivity." Pet. App. 11a (citing *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 870 (R.I. 1987); *Raymond v. Jenard*, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978)). It appears that, pursuant to this test, a

explicitly dismissed the notion that petitioner had somehow relied on the earlier statute in conducting its affairs, finding it "highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts." Pet. App. 14a. The Court further "agree[d] that facilitating settlement of the DEPCO litigation in light of the depletion of the credit union insurance policies would ultimately relieve to some extent the taxpayers' cost of the bailout." Pet. App. 15a. Even under the possibly less forgiving state test, the Court viewed that interest as sufficient to sustain the statute against due process attack.[9]

The Court also concluded that the law was not a bill of attainder and that it did not violate the contract clause. Addressing the first question, the Court stated that, "[g]iven the DEPCO Act's goal of encouraging settlements and saving the amount and cost of litigation, the statute could reasonably be said to further non-punitive legislative purposes." Pet. App. 18a. The Court found no merit in arguments that the Act was intended to punish petitioner in particular, remarking that "[n]either the Legislature nor this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst & Young or any other party. Consequently no punitive motive can be discerned." Pet. App. 18a.[10]

---

retroactive statute might be held invalid even when it satisfies the rational basis test, if the court regarded the potential unfairness as too severe.

[9] Petitioner also raised a procedural due process claim, contending that it was denied its right to be heard on the merits of the settlement between DEPCO and the Brown defendants. The Supreme Court rejected this argument without comment.

[10] As the Court observed, "[t]he burden thrust upon Ernst & Young by the DEPCO Act is choosing whether to settle the case, or continue its defense, with the potential of increased exposure if DEPCO enters into settlement agreements with other joint tortfeasors. The burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits." Pet. App. 19a.

Addressing the contract clause question, the Court—after saying that it saw "no contractual right that is impaired by this legislation" (Pet. App. 20a)—determined that the law was, in any event, constitutional. Again pointing to the "legitimate purpose of returning funds to the public," the Court found that "the DEPCO Act is not a law impairing the obligation of contracts . . . ." Pet. App. 20a.

DISCUSSION

This case does not warrant further review. With respect to the substantive due process argument—*i.e.*, that the statute deprived petitioner of a preexisting right to seek contribution—petitioner does not even contend that the Court below applied an erroneous standard to judge the constitutionality of the Act; rather, it offers only the garden-variety complaint that the Court wrongly applied the correct standard to this particular legislation. That issue would not justify a grant of certiorari even if the assertion were correct—which, in any event, it is not. As the Rhode Island Supreme Court correctly noted, the statute protecting settling defendants from suits for contribution, while providing non-settling defendants with a dollar-for-dollar offset against any eventual liability, serves the entirely legitimate, reasonable goal of facilitating settlement in an important, interrelated class of cases. Although petitioner urges this Court to second-guess that legislative judgment, nothing in the due process clause provides any basis for doing so. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984).

The procedural due process issue raised by petitioner—*i.e.*, that Rhode Island law denied it the right to be heard about the terms of settlement with joint tortfeasors—fares no better. In the first place, petitioner cannot plausibly demonstrate that Rhode Island has a rule barring it from being heard. The Court below did not say so, and petitioner's efforts to make such a holding out of

judicial silence are unavailing. Furthermore, the record here shows unequivocally that petitioner *was* given the opportunity to file briefs about the settlement with the Brown defendants and further given the opportunity to speak at the hearing to consider the settlement, both of which petitioner fully embraced. As the cases cited by petitioner themselves demonstrate, due process requires no more.

1. a. This Court has set forth, on numerous occasions, the basic standard for determining whether retroactive legislation comports with the due process clause. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994); *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).[11] That standard is, in effect, a two-part rational basis test: " '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 112 S. Ct. at 1112 (quoting *Pension Benefit Guaranty Corp.*, 467 U.S. at 730). The Court has also emphasized that, so long as "retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guaranty Corp.*, 467 U.S. at 729-30; *see also United States v. Carlton*, 114 S. Ct. at 2022. Just two Terms ago, in fact, the Court observed that "the *constitutional* impediments to retroactive civil legislation are now modest . . . ." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994).

---

[11] Because we believe that the petition should be denied in any event, we accept for purposes of this brief that the statute does operate retroactively.

Petitioner does not quarrel with the governing standard. Nor does it contend that the Rhode Island Supreme Court ignored it in favor of some other standard permitting more deferential scrutiny.[12] Its principal argument, therefore, is nothing more than an assertion that this particular statute lacks a rational basis. Even if there were merit in this argument, it would not make the case worthy of further review. But, in fact, the argument has no merit at all.

The crux of the argument is simply that the Rhode Island Legislature erred in concluding that the law would facilitate settlement of claims. *See* Pet. 13-15. As the Court below observed, however, the view taken by the legislature is perfectly rational. *See* Pet. App. 9a-10a, 15a-16a. The statute is not some aberration invented by the Rhode Island Legislature; rather, it is patterned after the 1955 version of the Uniform Contribution Among Tortfeasors Act, which has been adopted in 19 States. And that version was expressly premised on the belief that prior law—the version that applies generally in Rhode Island and that petitioner prefers—"discourage[d] settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file." Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (Commissioner's Comments to § 4) (1955).[13]

---

[12] As we have noted, *see* note 8 *supra*, the state standard appears *stricter* than the standard applied by this Court, allowing for invalidation of a statute simply because it results in too much "unfairness." Pet. App. 13a-16a. For good reason, *see* pages 13-14 *infra*, the Court below found no such unfairness here.

[13] As the comments to the Act pointed out, plaintiffs' attorneys were unwilling to release other (nonsettling) tortfeasors "to the extent of the pro rata share of the released tortfeasor," for the simple reason that "they have no way of knowing what they were giving up." Commissioner's Comments to § 4 (internal quotation marks omitted). That is precisely the dilemma faced by DEPCO in trying to settle cases arising out of the Rhode Island financial crisis.

The need to facilitate settlements is all the more apparent in the circumstances presented here. Having repaid depositors, DEPCO is now put in the position of seeking recovery from the individuals and institutions responsible for the financial crisis in the first place. There is, however, a practical problem in prosecuting these suits: because defendants are routinely covered by "wasting-asset" insurance policies—under which the costs of defense are deducted from the policy limits—the effect of protracted litigation is necessarily to "reduc[e] the amount of insurance coverage available to pay settlements or satisfy judgments." Pet. App. 9a. The solution adopted by the legislature is eminently sensible: to remove obstacles to potential settlements, allowing scarce funds to be directed toward repayment of obligations rather than consumed in adversarial proceedings. And, given that the cases all arise out of conduct occurring a number of years ago, the legislature, to make the law serve its purpose, had to make it applicable to suits involving that conduct.

Petitioner cannot seriously dispute the fact that, in this class of cases, the generally-applicable contribution rules were impeding settlement. What petitioner offers, instead, is its own solution to the problem: that DEPCO should simply grant "proportionate fault releases" to all settling defendants. *See* Pet. 15. But petitioner does not explain why DEPCO—which has undertaken to reimburse depositors injured by the joint tortfeasors—should be put at risk of insufficient recovery in order that those engaged in negligence and other malfeasance may have a ceiling on their liability. *See* note 13 *supra*. A State *could* make that choice, of course, but it is an odd proposition that a State *must* do so to be in compliance with the due process clause.

Petitioner contends, however, that the decision of this Court in *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), shows that the rule adopted by the legislature is irrational. Pet. 13-14. This is wishful thinking. In *McDermott*, this Court merely concluded that, in ad-

miralty cases, the "proportionate share" rule (the rule generally applicable in Rhode Island) is preferable to the *pro tanto* offset rule (the rule established by the legislation here at issue). To state the obvious, that holding does *not* mean that a decision to follow the *pro tanto* rule generally, or in any particular class of cases, would be *ipso facto* unreasonable.[14] Indeed, the opinion indicates just the opposite: after dismissing a third rule as "clearly inferior" (114 S. Ct. at 1467), the Court declared the choice between the remaining two rules to be "less clear" (*id.* at 1467), pointing out that the effect of the respective rules on settlements and judicial economy was "ambiguous." *Id.* at 1468, 1469.

Finally, the fact that DEPCO is a party to the litigation—and thus might gain some advantage from additional settlements—does not make the statute unconstitutional. To begin with, the principal thrust of the law is to adjust potential liability among the various tortfeasors themselves, not among DEPCO and the defendants. And, in any event, it is hardly uncommon for provisions in retroactive legislation to provide financial benefits to the enacting government or to relieve it of potential obligations. *See, e.g., Pension Benefit Guaranty Corp.*, 467 U.S. at 720-22 (statute protecting PBGC, a Government corporation, against expanded obligations); *see also Turner Elkhorn*, 428 U.S. at 8-12 (statute increasing employer, rather than government, liability). Indeed, that is always the case with respect to retroactive tax legislation, which has routinely been upheld by this Court. *See, e.g., United States v. Carlton*; *United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938).

b. Having no real legal argument to stand on, petitioner goes to considerable lengths to portray itself as the victim of unfair legislation. *See* Pet. 6-7, 15-18. This

---

[14] For example, Congress has adopted the *pro tanto* offset rule in cases arising under CERCLA. *See* 42 U.S.C. § 9613(f)(2).

sort of complaint is hardly novel: given that retroactive legislation by definition changes law after-the-fact, allegations of unfair treatment are part and parcel of due process challenges. But the due process clause does not guarantee the *status quo*. As this Court has made clear, " 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.' " *Pension Benefit Guaranty Corp.*, 467 U.S. at 729 (quoting *Turner Elkhorn*, 428 U.S. at 16); *see also Carlton*, 114 S. Ct. at 2023 (noting that, while taxpayer concededly relied on an earlier version of federal tax law, "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code").

The claim of unfairness in this case, moreover, is extraordinarily feeble. For example, petitioner cannot convincingly maintain that it would have altered its primary conduct if it had known of the new rule at the time. Although it has claimed that it considered risks, including litigation risks, in deciding whether to accept employment with RISDIC and various credit unions, the Supreme Court properly gave short shrift to those representations, finding them "less than persuasive." Pet. App. 14a. As the Court pointedly stated, "[i]t is highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts." Pet. App. 14a.

It is also important to recognize that the provisions of the law may actually work to the *benefit* of defendants like petitioner, in at least two ways. First, as the facts in *McDermott* demonstrate, the *pro tanto* rule may turn out to be *more* favorable to particular non-settling defendants. *See* 114 S. Ct. at 1463-64 (non-settling defendant sought application of *pro tanto* offset rule in order to achieve *greater* reduction of liability). And, even if that were not so, the statute allows *any* tortfeasor, including petitioner, to seek the potential advantages of negotiating a settlement and fixing its liability at an established amount. *See* Pet. App. 18a-19a ("[n]either the Legislature nor

this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst & Young or any other party").[15]

Finally, petitioner paints an unduly rosy picture of what its situation would have been under the alternative rule of contribution. Given that DEPCO would be free to collect the full amount of any judgment against petitioner, under recognized principles of joint and several liability applicable in Rhode Island, petitioner would be left with the subsequent task of pursuing claims of contribution against other tortfeasors. In the process, however, it would face precisely the same problem identified by the Court below: that, under the "wasting asset" policies held by other defendants, the costs of litigation would eat away at the funds available to pay settlements or satisfy judgments. Under those circumstances, petitioner (if found liable) might, as a practical matter, bear far more responsibility than under the present rule. This is not a case, therefore, where claims of "unfairness" have any real grounding in fact. *Compare Carlton*, 114 S. Ct. at 2023 (upholding statute even though taxpayer had relied to its detriment on prior, clearly more favorable law).

c. Petitioner also asserts that the decision below is in conflict with a decision of the Supreme Court of Virginia, *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). *See* Pet. 18-19. This assertion, even taken at face value, would not justify review here: the existence of a single contrary state-court decision, issued more than 11 years ago, simply does not demonstrate a conflict of

---

[15] Although petitioner argues that it "was the party 'targeted' by the Act," (Pet. 7)—a theory largely resting on an affidavit of its own associate general counsel—the Court below necessarily and properly rejected that argument, pointing out that, by the terms of the Act, "[t]he burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits." Pet. App. 19a. *See also* DEPCO Reply Brief (R.I.S.Ct.) at 11-13 (refuting petitioner's assertions).

such immediacy and importance as to call for the attention of this Court. Furthermore, there is less to this supposed conflict than meets the eye.

It is, at the very least, debatable whether the decision in *Shiflet* actually rests upon the federal due process clause.[16] But two things about the decision are not debatable. First, there was no need for the Virginia court to invoke principles of due process because, as the court made plain, state law prohibits retroactive application of a statute adversely affecting substantive rights. *See* 228 Va. at 120, 319 S.E.2d at 753-54. Any resort to the due process clause, therefore, was wholly gratuitous. Second, and equally important, the Virginia court did not even refer to, much less attempt to apply, the standard set forth in *Turner Elkhorn*—and reiterated three months earlier in *Pension Benefit Guaranty Corp.*—for evaluating challenges to retroactive legislation under the due process clause. By contrast, the Court below acknowledged that standard and applied, if anything, an even more exacting standard to the legislation at issue here. The decision in *Shiflet*, therefore, provides no sound basis for questioning the judgment in this case.

2. Petitioner also makes a procedural due process argument, asserting that it was denied its right to "meaningful participation" in settlement proceedings involving other parties. *See* Pet. 19-23. According to petitioner,

---

[16] Although the Virginia court did say that "retroactive application of the enactment would violate Eller's due process rights and would be invalid," 228 Va. at 121, 319 S.E.2d at 754, the two state cases cited in support of that declaration are decisions turning on issues of statutory construction. *See Duffy v. Hartsock*, 187 Va. 406, 421, 46 S.E.2d 570, 577 (1948) ("[w]e therefore conclude that the legislature, by express language, made manifest its intent that such amendments should apply as well to judgments theretofore rendered as to those thereafter obtained"); *Strickland v. Simpkins*, 221 Va. 730, 734, 273 S.E.2d 539, 541 (1981) ("[w]e do not believe that the legislature could have expressed its intention in clearer language").

this denial creates a conflict with decisions in the Second and Fourth Circuits recognizing that right. *See In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2d Cir. 1992); *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 n.3 (4th Cir. 1991). Assuming that this argument was properly preserved in state court,[17] it is nonetheless without merit: petitioner *was* allowed to participate in settlement proceedings involving other parties, and its claims of conflict are thus imaginary.

The Supreme Court of Rhode Island did not hold—either explicitly or implicitly—that a non-settling defendant has no right to be heard with regard to settlements involving joint tortfeasors. Although petitioner tries to put that face on the Court's (silent) refusal to accept its argument, a far more likely reason is the fact that petitioner *did* participate in the proceedings to assess the settlement between DEPCO and the Brown defendants. Petitioner was given (and accepted) the opportunity to file a brief addressing the merits of the settlement, and it was given (and accepted) the opportunity to present argument about the settlement before the court. The cases cited by petitioner call for nothing more.

Non-settling defendants, of course, may seek to diminish the attractiveness of settlement for other tortfeasors by making review of the settlement as burdensome as possible. But the right to be heard does not carry with it a corollary right to turn settlement hearings into the sort of extended litigation that settlement is meant to avoid. Thus, quite apart from the fact that petitioner had already enjoyed substantial discovery (*see* note 6 *supra*), it is not a violation of due process for a trial court, charged with evaluating the good faith of a settlement, to exercise

---

[17] Although petitioner addressed this issue in the state Supreme Court, its presentation before the superior court consisted, at most, of one or two passing references in its brief. It is open to fair question whether this treatment was adequate to preserve the issue for appeal. *See Vigneau v. LaSalle*, 111 R.I. 183, 300 A.2d 642 (R.I. 1973).

its discretion in order to assure that non-settling parties, while being heard, do not alter the nature of the proceedings. Here, the courts below considered petitioner's arguments and nonetheless concluded that the settlement was fair and made in good faith. Petitioner may continue to believe that the settlement should not have been approved, but that grievance is not of constitutional dimension.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD DECOF
JOHN S. FOLEY
HOWARD B. KLEIN
DECOF & GRIMM
One Smith Hill
Providence, RI 02903
(401) 272-1110

H. BARTOW FARR, III *
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

* Counsel of Record

Dated: October 13, 1995